

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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ALPHONSO M. DIGGS,

Petitioner,

v.

**ORDER**  
06-CV-584S

HON. ELIOT SPITZER, *NYS Attorney General*,  
and JAMES CONWAY, *Superinten., Attica*,

Respondents.

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1. On August 29, 2006, Petitioner commenced this action seeking federal habeas relief under 28 U.S.C. § 2254.

2. On May 14, 2007, this Court referred this matter to the Honorable Hugh B. Scott, United States Magistrate Judge, for all proceedings necessary for a determination of the factual and legal issues presented, and to prepare and submit a Report and Recommendation containing findings of fact, conclusions of law, and a recommended disposition of the case pursuant to 28 U.S.C. § 636(b)(1)(B).

3. In a Report and Recommendation filed on May 30, 2007, Judge Scott recommended that Petitioner's Petition for a Writ of Habeas Corpus be denied. Familiarity with Judge Scott's Report and Recommendation is presumed.

4. On June 4, 2007, Petitioner filed timely Objections to Judge Scott's Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Local Rule 72.3(a)(3). Respondents filed their opposition to Petitioner's Objections on June 14, 2007. Petitioner filed a reply memorandum on June 16, 2007, at which time this Court took the matter under advisement.

5. This Court has thoroughly reviewed Judge Scott's Report and Recommendation, Petitioner's Objections thereto, and the applicable law. Petitioner maintains that his conviction for robbery in the first degree was obtained in violation of his constitutional rights because law enforcement used unduly suggestive photo arrays and line-ups to obtain positive identifications from witnesses. Judge Scott concluded that no constitutional violations occurred, a conclusion with which this Court agrees. Judge Scott's Report and Recommendation is therefore adopted in full.

6. This Court notes that the photo array was not unduly suggestive because it was not purposefully compiled with two photos of Petitioner, and because no witness identified any photo other than Petitioner's current photograph. The two photographs of Petitioner were sufficiently dissimilar that Petitioner was in no worse position than if a photograph of a similar-looking person (albeit a different person) was used in the photo array. There is no evidence demonstrating that the inclusion of the two photographs of Petitioner, in and of itself, made the photo array unduly suggestive. Thus, under the totality of the circumstances, there was no substantial likelihood of a misidentification and no constitutional violation.

7. Accordingly, upon due consideration, this Court finds no legal or material factual error in Judge Scott's Report and Recommendation. Petitioner's Objections are denied, and this Court will accept Judge Scott's Report and Recommendation in its entirety.

IT HEREBY IS ORDERED, that this Court accepts Judge Scott's May 30, 2007, Report and Recommendation (Docket No. 13).

FURTHER, that Petitioner's Objections (Docket No. 14) are DENIED.

FURTHER, that Petitioner's petition seeking federal habeas relief (Docket No. 1) is DENIED.

FURTHER, that because the issues raised in the petition are not the type that a court could resolve in a different manner, and because these issues are not debatable among jurists of reason, this Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right, 28 U.S.C. § 2253(c)(2), and accordingly, a Certificate of Appealability is DENIED and shall not issue.

FURTHER, that this Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal would not be taken in good faith.

FURTHER, that the Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: October 9, 2007  
Buffalo, New York

/s/William M. Skretny  
WILLIAM M. SKRETNY  
United States District Judge